IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 165.

DEAUVILLE ASSOCIATES, INC., *Petitioner,*

v.

JOHN M. MURRELL and D. H. REDFEARN, as Receivers of Deauville Corporation, *Respondents.*

REPLY BRIEF ON BEHALF OF PETITIONER IN SUPPORT OF THE PETITION FOR CERTIORARI.

---

1. The court below has denied petitioner its day in court. That central fact stands, and is not in any way challenged or qualified by the digressions, technicalities and sundry appeals in the brief of respondents in opposition to the petition for certiorari.

Respondents indeed recognize the elementary injustice of the decision below when they suggest (p. 20) that this ruling will not be followed in other types of cases. Yet respondents' only distinction of this case rests on the fact that petitioner is an assignee pendente lite. Respondents argue (p. 20) that therefore petitioner could have been de-

nied intervention entirely, citing a dictum from *Mellen* v. *Moline Malleable Iron Works,* 131 U. S. 352, 371, and accordingly petitioner cannot complain of the futile intervention upheld below.

The *Mellen* dictum, if good law, would be a reason why intervention should be denied entirely. Indeed, respondents cited the *Mellen* case to the court below on the hearing of No. 12436, and again urged that precedent on a ground of a petition for rehearing of the decision in *Deauville Associates, Inc.* v. *Eristavi-Tchitcherine,* 173 F. 2d 745. The court below held, however, and quite properly (see point 2 below), that the District Court did not have discretion to refuse intervention.

The question then arises whether a court which erroneously denied an intervention can then deny intervenor the right to attack decrees entered while its erroneous denial was being reversed. That is the question presented to this Court by petitioner.

2. The court below was quite right in ignoring the ill-considered *Mellen* dictum. The decision in the *Mellen* case is the classic *lis pendens* doctrine, that a purchaser of real estate pendente litem who did not become a party to the main suit may not attack the judgment collaterally. Counsel for petitioner have found no Federal ruling which precluded the transferee from becoming a party to the main suit. Reference to the two Supreme Court cases cited in the *Mellen* case discloses that in one case the transferee did become a party to the main suit (*Union Trust Co.* v. *So. Inland Nav. & Imp. Co.,* 130 U. S. 565) and the other case noted that that assignee would have had the right to become a party (*Eyster* v. *Goff,* 91 U. S. 521, 524.)

When faced with the question directly, rather than *obiter,* this Court made provision for protection of the assignee by the District Court. *Woodman* v. *Missionary Society,* 124 U. S. 161. That such protection is properly afforded by allowing intervention was held in *Gaines* v. *Clark,* 275 Fed. 1017, decided by the Court of Appeals of the District

of Columbia. That case involved a suit to subject land to payment of notes secured by a deed of trust, and reversed the denial of intervention by a person who acquired his interest in the fee by purchase pending litigation. The court pointed out that otherwise the intervenor would be without a remedy to protect himself, and said, "we think the preponderance of modern authority is that a purchaser, or one acquiring an interest pendente lite, is entitled to intervene." 275 Fed. at 1020.

If the ruling below is to be supported on an application of the old *Mellen* dictum, the ruling involves a conflict with *Gaines* v. *Clark,* disregards a decision of this Court, and would mean a denial of a day in court warranting review by this Court as an important decision of Federal procedure.

3. Respondents say (Brief p. 11) that this petition for certiorari must fail because petitioner did not seek review of the ruling of the Circuit Court of Appeals in No. 12436, *Deauville Associates, Inc.* v. *Eristavi-Tchitcherine,* 173 F. 2d 745, see R. 146.

Far from being requisite it would have been inappropriate for petitioner to have sought review of that decision. Could petitioner have complained that it was not being granted intervention under Rule 24(a), and that it was not being granted a day in court? The opinion in question plainly said that petitioner was entitled to intervene under Rule 24(a) and that it was entitled to a day in court. (R. 146)

Nor could petitioner have insisted that the cryptic closing phrase "as of this date" meant that petitioner could not have its day in court on the merits of the intervening decree. There was certainly a possibility that the appellate decree might be so applied and petitioner filed a petition for rehearing to obtain a clarification obviating such a miscarriage of justice.

But it was more reasonable to expect that the decree would be applied to give petitioner its day in court on the

merits, in accordance with *Pyle-National Co.* v. *Amos,* 172 F. 2d 425 (C.C.A. 7th). The *Amos* case described a procedure whereby intervenor filed a *new* petition to attack the unsatisfactory judgment entered by the District Court after its erroneous denial of leave to intervene. Petitioner has likewise filed a petition attacking the intervening judgments (R. 72ff).

That the decree in No. 12436 did not require that petitioner be foreclosed from being heard on the merits is also indicated by the fact that appellees filed a petition for rehearing, protesting the ruling of the Circuit Court of Appeals and asserting that under the *Mellen* case a transferee *pendente litem* had no right to litigate its title.

If an application for certiorari had been filed in No. 12436, this Court would obviously have considered that petitioner could not cry before it was hurt, and that in view of the procedure available under the doctrine of the *Amos* case petitioner could not at that time assert a conflict with *Wolpe* v. *Poretsky,* 144 F. 2d 505 (D. C. App.).

When the Circuit Court of Appeals denied both petitions for rehearing in No. 12436, petitioner followed the proper course by proceeding in the District Court for its day in court under the procedure of the *Amos* case. The failure of both courts below to provide that day in court, as shown by this record, render appropriate the filing of the present petition for certiorari.

4. Respondents are in error in asserting that the ruling in No. 12436 was a final judgment which had to be appealed at that time. There is a fundamental difference between an order denying intervention as of right, which is appealable, and an order admitting the proposed intervenor into the case. The ruling in question manifestly did not have the characteristic of a judgment which "terminates the action" and thus must be appealed or waived. *Reeves* v. *Beardall,* 316 U. S. 283.

That the ruling referred to was not a final judgment adverse to intervenor is clearly seen from the most recent

opinion of this Court as to the elements that make up such a final judgment. *Dickinson* v. *Petroleum Conversion Corporation,* 70 Sup. Ct. 322. This Court there noted that an intervenor must appeal from, or lose the right to appeal, an order denying his absolute right to intervene, because by that ruling "the would-be intervenor is foreclosed from further action in the case and its proceedings cannot affect him nor can he affect them." (70 S. Ct. at 325.) He must likewise appeal from a judgment on the merits adverse to his separate claim. "In either case, the lawsuit is all over so far as the intervenor is concerned." (70 S. Ct. at 325.) But an order granting intervention by its very nature means that the intervenor is not foreclosed from further action in the case or that the lawsuit is all over.

Thus the decree of the court below in No. 12436 was not in the category of final judgments. Moreover, as already shown, the court's opinion, fairly read, did not even constitute a decision advising that petitioner's claim on the merits would be dismissed when duly presented, although the court below now reads its earlier ruling in that fashion.

The doctrine requiring the taking of appeals from a final judgment only applies to a ruling which constitutes a "definitive adjudication," *Missouri-Kansas Pipe Line Co.* v. *United States,* 312 U. S. 502, 506, and is inapplicable where the questions which would have to be raised are speculative ones. *Credits Commutation Co.* v. *United States,* 177 U. S. 311, 316. Only in 1950 did the court below definitively and clearly rule that petitioner was disabled from contesting decrees entered before April 4, 1949. Petitioner was not required at its appeal to seek certiorari from the 1949 decree in No. 12436.

5. Respondents further object (Br. p. 22) that the District Court orders are not final. The order directing the receivers to sell the listed property (R. 78), which is based on a rejection of petitioner's purchase claim, is properly before the Court although the particular sale then contemplated was not consummated and the property was offered

again a year later subject to the action in this case. Moreover, respondents make no reference to the fundamental judgment, striking and denying the petition to set aside the orders previously entered (R. 82), which is plainly an order on the merits and thus in the class of final judgments.

6. This case basically involves a question of intervention procedure turning upon the rulings of the courts below. The substantive litigation is primarily merely a matter of background. It would promote unnecessary discussion to explore all the side-topics discussed in respondents' brief. It suffices to call attention to a few matters mentioned by respondents:

a. Respondents' irrelevant and gratuitious reference (Br. p. 4) to the fact that Mr. Kowal was formerly called Kowalsky dramatically reveals the plane of their brief. Respondents also refer to indefinite allegations of fraud by Lasser and Winkel against their former attorneys of record. Respondents note that Samuel Rubin was one of those attorneys of record, (Br. p. 7), citing R. 215, No. 11978, but fail to mention what that record reference shows, that the primary attorneys of record representing Lasser and Winkel were Charles Danton, and Redfearn and Ferrell, Redfearn being a respondent herein and Danton and Ferrell being counsel for respondents.

b. Respondents apparently attempt to paint a picture of a dilatory intervenor who did not come into the litigation until it had been pending more than two years, who waited before filing an intervention, who failed to appeal a first denial of the intervention in May 1947, etc. (Brief, p. 6). There is absolutely no basis for asserting a lack of timely application, and neither court below so claimed. The relevant facts are outlined in Appendix A, and may be summarized as follows:

Sixteen months after the filing of the original complaint in February 1945, Mr. Kowal was brought into negotiation with the plaintiff's attorney, Mr. Murrell, for im-

plementing a settlement between the parties. That deal fell through and in August 1946 Mr. Kowal made a joint venture agreement with defendants Lasser and Winkel. Plaintiff filed an amended complaint in September 1946. Defendants filed their answer and cross-complaint in November 1946. Mr. Samuel Rubin was then acting as associate counsel for defendants. Defendants moved for judgment on the pleadings in January 1947. The District Court's opinion-order of April 24, 1947, was in favor of defendants, granting specific performance of the May 15, 1944, agreement to purchase the hotel property, conditioned, of course, upon relinquishment of all rights to stock in Deauville Corporation by defendants, the Kowals, and petitioner. (No. 11978, R. 344.)

The District Court indicated that the Kowal's interest in the real estate could appropriately be protected by intervention (No. 11978, p. 347). Petitioner's intervention application was filed on May 8, 1947. The District Court ordered that that application be withdrawn as confusing and unnecessary at that particular time, but stated it would be without prejudice to a later intervention petition. (No. 12436, p. 444). The Circuit Court of Appeals reversed the judgment on the merits in November 1947, and petitioner then filed the applications for intervention here in issue on January 16, 1948, and February 13, 1948 (R. 26, 74; see No. 12436, pp. 2, 8).

It is evident that petitioner has acted timely and has in no way delayed the litigation. The delays have ensued from the District Court's erroneous denial of the intervention application, for which petitioner can hardly be held responsible.

Conclusion.

This case presents a conflict of decisions of circuit courts of appeals, and a basic injustice denying petitioner its day

in court. The petition for a writ of certiorari should be granted.

Respectfully submitted,

HAROLD LEVENTHAL,
914 Ring Building,
Washington 6, D. C.

SAMUEL H. RUBIN,
2315 Cadillac Tower,
Detroit, Michigan.

SAMUEL J. KANNER,
213 Shoreland Building,
Miami, Florida.

August 1950.

APPENDIX A.

Steps taken by Mr. Kowal and petitioner to protect intervening interest.

Respondents state that petitioner came into the proceeding when the action had been pending "over two years"; that the intervention on May 13, 1947, was denied and petitioner did not appeal, and that the next intervention petitions were not filed until January and February 1948. (Brief, p. 6)

The basic time-table may be summarized as follows: The complaint was filed February 16, 1945. The second amended complaint was filed on September 24, 1946. The defendants filed an answer and cross-complaint on November 4, 1946. Defendants moved for judgment on the pleadings on January 16, 1947. The District Judge filed opinion orders in favor of defendants on March 26 and April 24, 1947. The Circuit Court of Appeals reversed on November 7, 1947. (See Appendix to petition for certiorari.)

Isadore Kowal started negotiations for the hotel, acting on behalf of himself and his sons, in July 1946 when he met with John Murrell, attorney for plaintiff (No. 12436, p. 9), regarding acquiring the hotel property. The plaintiff and defendants had entered into a settlement agreement dated May 24, 1946 (No. 12436, p. 647), which was extended until August. Kowal made a proposal to John Murrell, as trustee, on August 6, 1946; this was eventually rejected. (No. 12436, pp. 11, 641) (See testimony of Charles Danton, pp. 126-129). Mr. Kowal entered into negotiations with Charles Danton, counsel for respondent herein, and then attorney for defendants Lasser and Winkel. Mr. Kowal executed an agreement of August 17, 1946, with Lasser and Winkel to acquire half their interest, this being a joint venture under the name "Deauville Associates" (No. 12436, p. 623, Exh. 2; p. 12). Mr. Kowal advanced $25,000—$10,000

to Lasser, $10,000 to Winkel, and $5,000 to Charles Danton, as attorney for the joint venture. (No. 12436, p. 143). Kowal did not then know (No. 12436, p. 130), but later learned that Lasser and Winkel had pledged their stock in Deauville Corporation as security for a debt; Kowal paid the debt and acquired the stock certificates (No. 12436, pp. 13-14). Subsequently petitioner was organized, on March 12, 1947, as a corporate form for the joint venture, and stock in petitioner was issued, 50% to Lasser and Winkel, and 50% to Kowal.

During the latter part of 1946, after the execution of the joint venture agreement, attorney Samuel Rubin appeared as associate counsel for Lasser and Winkel. At that time he signed, with Charles Danton and R. H. Ferrell (counsel for respondents herein), the defendants' cross-complaint of November 4, 1946 (No. 11978, p. 215). The District Court accepted him as associate counsel for defendants, in view of his connection with their interests, but this status was terminated by the District Court on May 13, 1947, when he was confined to representation of the Kowals. (No. 12436, p. 439).

The District Court on April 24, 1947, entered an opinion order granting Lasser and Winkel specific performance of their May 15, 1944, agreement.

This was based upon defendant's answer consenting to relinquishment of all rights to the stock of Deauville Corporation, and also was conditioned upon disclaimer of all rights in that stock by the Kowals, and later also by petitioner. (No. 11978, pp. 344-353). The Court stated that if the Kowals loaned moneys to the defendants in good faith on the stock as collateral, they should seek to intervene for the protection of their interest in the real estate and of their rights against Lasser and Winkel. (No. 11978, p. 347)

When petitioner presented its application to intervene of May 8, 1947, (No. 12436, p. 417), the District Court ruled that this petition should be withdrawn as possibly confusing the status of the parties, in view of pending disclaim-

ers, at that particular time. The court stated that petitioner was not required to take an affirmative step at that particular time, since nothing could be done until the future, and could intervene in the future (No. 12436, pp. 443-444).

Following the reversal by the Circuit Court of Appeals in November 1947, petitioner filed applications to intervene on January 16, 1948 and February 13, 1948 (R. 26, 74; see No. 12436, p. 218). The supplemental application alleged that although at first Lasser and Winkel held stock in petitioner corporation, they had pledged that stock to secure further advances by Kowal and now held no more stock.

The District Court denied the application on April 1, 1948, on the ground that Mr. Kowal either knew or else he was chargeable with knowledge of the fact that Lasser and Winkel had acted in violation of an injunction in transferring their stock in Deauville Corporation (No. 12436, p. 408). No reference was made to the assignment by Lasser and Winkel of their right to purchase the hotel.

Petitioner immediately sought a mandamus from the Circuit Court of Appeals, but on April 16, 1948, that court denied mandamus and held it would review the matter upon appeal. (R. 138, 148). The appeal was not heard and decided until April 4, 1949 (R. 146-148).